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Attorney for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

CONNIE KWOK,)	Case: 2:10-cv-00215-RCJ-RJJ
)	
Plaintiff,)	
)	
vs.)	
)	OPPOSITION TO DEFENDANTS'
)	MOTION TO DISMISS
RECONTRUST COMPANY, N.A.;)	
BANK OF AMERICA; BAC HOME)	
LOANS SERVICING, LP; MORTGAGE)	
ELECTRONIC REGISTRATION)	
SYSTEMS, INC.; COUNTRYWIDE)	
HOME LOANS, INC.,)	
)	
Defendants.)	
)	

Plaintiff, Connie Kwok, through her attorneys, Rosenfeld Roberson & Rinato, submit the following Opposition to Defendants' Motion to Dismiss filed with the Court on March 29, 2010.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This is a simple case of Defendants that cannot show that any of them are either the current holder of the note or the nominee of the current holder of the note, secured by Plaintiff's property (the "Note") that was the subject of a wrongful foreclosure in this case (the "Property"), which is a prerequisite to foreclosure pursuant to the very recent decision of this Court, *Mortgage Electronic Registration Systems, Inc. v. Lisa Marie Chong, Leonard E. Schwartzer, Bankruptcy Trustee, et al.*,

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1 Dist. Ct. Case No. 2:09-cv-00661-KJD-LRL (Dec. 4, 2009) (“MERS” had no standing as a creditor
 2 to pursue its claim against the property), *affirming In re Joshua and Stephanie Mitchell*, U.S. Bk.
 3 Ct., Dist. Nev. Case No. BK-S-07-16226-LBR (Aug. 19, 2008); *see also Landmark Bank v. Kesler*,
 4 2009 Kan. Lexis 834; *MERS v. Southwest Homes of Arkansas*, 2009 Ark. Lexis 121. Defendants
 5 cannot prove that any of them are a current holder in due course of the Note, any more than any
 6 other third party stranger to the transaction, and, therefore, there is a risk that a true holder in due
 7 course of the Note may surface in the future, demanding payment. Under the case law set forth
 8 above, none of the Defendants have any standing to collect on the Note or to foreclose on the
 9 Property, and, Plaintiff must prevail. Defendants have committed numerous other wrongdoings, as
 10 discussed below, in predatory and fraudulent lending practices, including, without limitation, the
 11 acts set forth in Plaintiff’s Complaint. Plaintiff will seek discovery as to whether Defendants have
 12 been compensated for the loan by the federal stimulus program or “TARP.”
 13
 14

15 II. PLAINTIFF’S CLAIMS OF FRAUD ARE PLEADED 16 WITH SUFFICIENT PARTICULARITY

17 The fraud occurred in connection with the making of the loan, by the Defendants, in, among
 18 other things, committing the acts set forth in the Complaint, during the loan approval process, and
 19 the subsequent securitization/sale of the loan. That is sufficiently specific, and, to the extent
 20 Plaintiff cannot be more specific at this time, it is symptomatic of the entire series of transactions,
 21 which resulted in the current situation, wherein no current holder in due course of the Note can be
 22 identified, upon information and belief. Plaintiff does not claim that selling the loan, of itself, was
 23 wrongful; however, the problem is that Defendants cannot produce a current holder in due course of
 24 the Note. Discovery is needed in order for Plaintiff to determine more details, including, without
 25 limitation, relating to conspiracy to commit fraud, to the extent such information is available. *See*,
 26 *e.g. Vision Air*, 121 Nev. 113 (2005) (dismissal denied - 8 months is not sufficient time for discovery
 27
 28

1 in a debt collection case). This involves a period of unprecedented non-transparency in the financial
2 industry, and, after discovery, Plaintiff will seek to file an amended, more particular, Complaint.

3 **III. PLAINTIFF IS THE ADVERSE PARTY WITH** 4 **RESPECT TO THE QUIET TITLE ACTION**

5 Defendants claim that there is no adverse party to justify a quiet title action. Plaintiff is the
6 adverse party, claiming outright ownership of the property, unencumbered by any obligation to any
7 Defendant.
8

9 **IV. DEFENDANTS BREACHED THE DUTY OF** 10 **GOOD FAITH AND FAIR DEALING**

11 The ultimate act of bad faith occurred when Defendant MERS attempted to foreclose without
12 any standing to do so, as either the current holder of the Note or the nominee of the current Note
13 holder in due course. To be the nominee for an unnamed beneficiary is not sufficient. *See Chow,*
14 *supra.* MERS may have standing to foreclose, in some cases, but not where it cannot establish who
15 the current holder of the Note is. *See Chong, supra.* Regarding contractual breach of the implied
16 covenant of good faith and fair dealing, the covenant is contained in every contract, and it was
17 clearly breached in this case. *See NRS 104.1203, NRS 686 A.020, NRS 42.005. Albert H. Wohlers*
18 *& Co. v. Bartqis*, 114 Nev. 1249, 969 P.2d 949 (1998). For fraud-based breaches, it is clear that a
19 strict fiduciary relationship is not required, but rather a special relationship characterized by
20 elements of public interest, adhesion, etc., including insurance contracts, employment, bailment and
21 franchise agreements. *See Great Amer. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 934 P.2d 257
22 (1997); *United States Fidelity & Guav. Co. v. Peterson*, 91 Nev. 617, 540 P.2d 1070 (1975)
23 (insurance company failed to cover losses without proper cause). Certainly this case is as
24 compelling on both contractual and tort grounds for bad faith conduct occurring since the time of the
25 loan application to the present, including the fraudulent, wrongful foreclosure, in clear violation of
26
27
28

1 NRS 107.080(4) (trustee's sale must be by a person authorized to sell under the deed of trust).

2 Accordingly, none of the statutory notices for sale of the Property were properly given.

3 **V. THE RICO CLAIM IS VALID**

4 The criminal predicate acts for the RICO claim are fraud, as set forth in the Complaint.

5 Plaintiff anticipates that, after completion of discovery, a request to file an amended Complaint will
6 be filed, at which time more particularity will be pled.
7

8 **VI. CONCLUSION**

9 Based on the foregoing, and the need for discovery as to the identity of the current holder of
10 the note, Plaintiff respectfully requests the Court to deny Defendants' motion to dismiss. No statute
11 of limitations can apply, because Plaintiff learned of her causes of action just prior to filing this
12 lawsuit.
13

14 ROSENFELD ROBERSON & RINATO

15 /s/ Jeffrey D. Conway

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document was served on counsel, listed below, on the 29 day of March 2010, through the Court's electronic service system:

J. Christopher Jorgensen
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Attorney for ReconTrust Company, N.A., Bank of America, BAC Home Loans Servicing, LP,
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/s/ John R. Conway

an employee of Rosenfeld Roberson & Rinato